UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re	Case No. 00-6028-WRS Chapter 13
EDWARD S. CHILDS,	
Debtor	
CURTIS C. READING, TRUSTEE,	
Plaintiff	Adv. Pro. No. 03-1071-WRS
v.	
MORRIS BART, et al.,	
Defendants	

MEMORANDUM DECISION

This Adversary Proceeding is before the Court on a motion to stay proceedings filed by the Gallagher Defendants. (Doc. 323). The Court heard argument on the motion on May 1, 2006. The Gallagher Defendants were present by counsel David B. Anderson, the Bart Defendants were present by counsel Frank Parker and Von Memory and the Plaintiffs were present by counsel Steve Olen. For the reasons set forth below, the motion to stay proceedings is DENIED.

I. FACTS

As this Adversary Proceeding is before the Court on a motion to stay proceedings, the Court will assume, for the purpose of deciding this motion, that the facts alleged by the Plaintiff, the nonmoving party, are true. This Adversary Proceeding was brought by Plaintiff Curtis C.

Reding, the Standing Chapter 13 Trustee in this District against Defendants Morris Bart, Morris Bart, A.P.L.C., Michael T. Gallagher and Gallagher, Lewis, Downey & Kim. For ease of reference, the Defendants are placed into two groups which the Court will refer to as the Bart Defendants and the Gallagher Defendants. The operative complaint is the Third Amended Complaint, which was filed on March 30, 2005. (Doc. 178, 179). The Trustee has settled his claims against the Bart Defendants, leaving for adjudication his claims against the Gallagher Defendants.[1]

Gallagher is a Texas law firm which specializes in mass tort claims which are brought by way of class-action suits. It is believed that Gallagher has several thousand clients in the State of Alabama, 33 of whom have been identified as individuals who have filed bankruptcy in this District and who have received cash payments in settlement of their claims. The Trustee alleges that Gallagher has a pattern and practice of disregarding the bankruptcy filings, paying his clients their share of the settlement proceeds and withholding his attorney's fees from the remainder. The Trustee alleges that this practice violates a number of provisions of the Bankruptcy Code and, more importantly, deprives the bankruptcy estates, and ultimately the creditors of money due them.

The Trustee alleges four overlapping claims in his Third Amended Complaint. (Doc. 178). First, it is alleged that Gallagher has abused the bankruptcy process in his failure to have his employment approved by the Court pursuant to 11 U.S.C. § 327.[2] Second, the Trustee

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[1] Chapter 7 Trustee Susan DePaola is also a named Plaintiff. For ease of reference, the Plaintiffs will be referred to as the Trustee or the Plaintiff.

[2] For ease of reading, the Court will dispense with the "11 U.S.C." references and it should be assumed that all references are to the Bankruptcy Code unless otherwise indicated.

alleges that Gallagher abused the bankruptcy process because he did not move the Court to approve the compromise of the claims, which were property of the estate. Third, the Trustee alleges that Gallagher has taken property of the estate in violation of § 362. Fourth, the Trustee seeks an injunction to permanently enjoin Gallagher from any future violations of the pertinent Bankruptcy Code provisions and applicable Bankruptcy Rules. If the Trustee's allegations are shown to be true, there has been a massive diversion of funds which were property of the bankruptcy estates of the named bankruptcy debtors/mass tort plaintiffs.

In this Court's Memorandum Decision of August 19, 2005, it characterized the Trustee's claims here as in the nature of an action to turnover property of the estate. (Doc. 254, pp. 2-4). Such actions are governed by the provisions of § 542. The Court used the language "in the nature of an action to turnover" because this is not a typical turnover proceeding. The usual turnover proceeding involves a defendant who was dealing with the debtor at arms length. § 542(b). Referring to § 542(e), a trustee may obtain books and records from accountants and attorneys. The Trustee does not cite § 542 in his Third Amended Complaint and this proceeding does not neatly fit the mold of a typical turnover proceeding that one might see in Bankruptcy Court.

One might look to § 543, which governs actions for turnover of property by a custodian. To the extent that Gallagher had custody and control over property of the estate, this action could be characterized as an action for turnover by a custodian, however, the problem here is that Gallagher does not neatly fit the definition of custodian. § 101(11). The Court does not concede that because the Trustee's action here does not neatly fit the contours of the kinds of actions that Bankruptcy Courts usually see, that it is powerless to do anything about what the Trustee alleges

as a massive diversion of property of 33 bankruptcy estates.

Gallagher further claims that this Adversary Proceeding should be dismissed because, as a result of the settlement with the Bart Defendants, the estates have been made whole and there is no longer any deficit in any of the estates. There are at least two problems with this argument. First, the Trustee denies that this is so and Gallagher has not submitted any evidence in support of this claim. As there are presently facts in dispute, it would be improper to dismiss the Trustee's claims. Second, it is the Court's understanding that Gallagher has withheld his attorney's fee from property of the estate. If that is true, Gallagher's attorney's fees can be disgorged. As a final matter, if it is shown that Gallagher has willfully violated provisions of the Bankruptcy Code and Bankruptcy Rules which regulate his conduct, with respect to the 33 bankruptcy estates, sanctions may be imposed for the violations.

II. THE BANKRUPTCY PROCESS

The Trustee's allegations are best framed in the context of how the bankruptcy system works, or how it is intended to work, and then the allegations will be revisited again once context is provided. First we will consider Chapter 7 bankruptcy cases. Shellwanda Babers is identified in the Trustee's complaint as a Chapter 7 Debtor who is represented by Gallagher.

A. Chapter 7 Cases

Babers filed a petition in bankruptcy in this Court, under Case No. 01-2347, on April 12, 2001. At the time she filed the case, she was required to file various statements and schedules with the Court disclosing, among other things, all of her assets, all of her liabilities and

identifying all lawsuits to which she was a party. § 521; Bankruptcy Rule 1007; see also, Official Forms 6 and 7. At the time Babers filed her petition in bankruptcy, all of her property became property of the estate. § 541. Babers' personal injury claim, assuming that she in fact had one, should have been disclosed on Schedule B, as a claim owing to the Debtor. Moreover, if suit had been filed, the existence and particulars of the suit should have been disclosed in the answer to Question No. 4 in the Statement of Financial Affairs.

Once the bankruptcy case is filed, a trustee is appointed, who in Babers' Chapter 7 case was Susan DePaola, one of the Plaintiffs in this Adversary Proceeding. One of the most important functions of a Chapter 7 Trustee is to "collect and reduce to money the property of the estate." § 704(1).

The Bankruptcy Code regulates the employment of professional persons, including attorneys, by the Trustee. § 327; Rule 2014, Fed. R. Bankr. P. Had Trustee DePaola known of the suit Gallagher was handling for Babers she could have employed him, or another lawyer, for the purpose of litigating her claim. § 327(e). Lawyers who are retained must make a written disclosure of their agreement with the debtor. §§ 327, 329; Rules 2014, 2016(b). Moreover, the Court may order an attorney to disgorge any payment which is excessive or improper. Rule 2017, Fed. R. Bankr. P.[3]

Assuming that this process of disclosure and the retention of counsel works properly, and

[3] For a more detailed explanation of the process by which attorneys are employed and compensated, see, In re: Tri-State Plant Food, Inc., 273 B.R. 250 (Bankr. M.D. Ala. 2002). It should be noted that Tri-State was a case under Chapter 11, while Babers is a case under Chapter 7. The process is the same in both chapters. However, the process for retaining and compensating counsel is different in cases under Chapter 13. Those differences will be discussed later in this Memorandum Decision.

further assuming that the estate is successful either by winning its lawsuit or settling it, thereby obtaining cash for the estate, the Chapter 7 Trustee completes her administration of the estate. A distribution of money is made to creditors. § 726. Distribution to creditors is made in accordance with an elaborate scheme. § 507. For example, had Gallagher made proper disclosures, had he been properly retained by the Trustee and his employment approved by the Court, had he made a proper application for professional fees, his claim would have qualified as an administrative priority claim pursuant to § 507(a)(1).[4] Babers would not be entitled to a distribution unless all of her creditors were paid in full. § 726(a)(6).

Gallagher's actions, in settling Babers' case, distributing settlement funds to the Debtor and retaining his fees for himself, circumvents an elaborate process which is designed to balance the rights of a number of parties. If the facts establish that Gallagher in fact did this, he turned the priority scheme on its head, paying the debtor first, to the detriment of her creditors. Moreover, he would have circumvented the elaborate scheme which regulates the retention and compensation of counsel in bankruptcy cases. Gallagher has raised by way of a defense, that he was misled by his clients and that he did not know of the bankruptcy filing and that any violations of the requirements of the Bankruptcy Code were unintentional. In response to Gallagher's motion for summary judgment, the Plaintiffs submitted a massive amount of evidence which rebuts Gallagher's claim of ignorance. (Docs. 271, 272). There is a genuine issue of material fact on this claim, which can only be resolved by way of a trial.

[4] The priority scheme was amended pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. However, as this case was filed before its effective date, the BAPCPA amendments are not applicable here.

B. Chapter 13 Cases

Chapter 13 bankruptcy cases are administered differently than cases under Chapter 7. Instead of a Trustee taking control of the assets and causing a single distribution to creditors, rather a Plan is filed and, if confirmed, periodic payments are made by the Debtor to the Chapter 13 Trustee. The Chapter 13 Trustee collects the payments and then makes distributions to the creditors, over the life of the Plan. § 1302. Chapter 13 cases differ from Chapter 7 cases in that there is usually no liquidation of the debtor's assets. In a case under Chapter 13, the debtor remains in possession of his property. § 1306(b).

While there are facial differences between cases under the two chapters, upon closer examination, there are similarities as well. For example, a Chapter 13 Plan may not be confirmed unless it proposes to pay creditors more than they would receive under a case under Chapter 7. § 1325(a)(4). This is sometimes called the "best interest of the creditors test." This provision has significance here in that the existence of a personal injury claim will have an impact upon distribution in the hypothetical Chapter 7 case. That is, the Chapter 13 Plan payments must exceed the distribution under a hypothetical Chapter 7 liquidation. In general terms, a debtors' Chapter 13 Plan may account for a personal injury claim in one of two ways. First, the monthly payments can be set high enough to cause the Chapter 13 distribution to exceed the hypothetical Chapter 7 liquidation distribution. Second, the Chapter 13 plan may set a payment amount which would satisfy the § 1325(a)(4) amount, disregarding the personal injury claim, and further provide that the proceeds of the suit be paid to the Chapter 13 Trustee for distribution to the creditors. Either of the two methods comport with the requirements of § 1325(a)(4), however, most debtors opt for the second alternative because it keeps the monthly

payments lower until the distribution is received in satisfaction of the personal injury claim.

If a Chapter 13 debtor does what he is supposed to do, and if his lawyer does what he is supposed to do, the system works quite well. The debtor is given the protection of the automatic stay and a fresh start when he completes his plan payments and creditors are given their due under the law. Problems arise when debtors or their lawyers do not do what the law requires of them. For example, some debtors will fail to disclose the existence of a personal injury suit, which artificially depresses the amount to be paid to creditors because the § 1325(a)(4) calculation does not take into account the personal injury suit. Such a situation perpetrates a fraud on the creditors.

In other instances, the debtor's Chapter 13 Plan may properly account for a personal injury claim, but in the administration of the Chapter 13 case, the proceeds, for any number of reasons may not be paid over to the Trustee for distribution to creditors. Gallagher has cited an unpublished decision of this Court in support of his position. In re: Smock, Case No. 01-5533, Memorandum Decision dated July 17, 2003. In Smock, the Chapter 13 Trustee learned that the Debtor had a personal injury suit. At his insistence, the Chapter 13 Plan was amended to provide that the proceeds of the suit be paid to the Chapter 13 Trustee, to be distributed to creditors. During the pendency of the bankruptcy case, Smock settled her personal injury suit, resulting in the payment of $28,000, to her. The lawyer who represented Smock in her Chapter 13 case was aware of the settlement and claimed that he told Smock to pay the money over to the Chapter 13 Trustee, as she was required to do so by the terms of her Plan. The lawyer did not contact either the Chapter 13 Trustee nor did he make the lawyer who represented Smock in the personal injury suit aware of the debtor's obligations under the confirmed Chapter 13 Plan. In that case, it was

undisputed that the lawyer who handled the personal injury suit was not aware of Smock's bankruptcy filing.

By the time the Court learned of the personal injury settlement, Smock claimed that the money had been dissipated. This Court took the following action in response: (1) Smock's Chapter 13 case was dismissed, with prejudice. This means that any debt which was in existence as of the date of the bankruptcy filing would not discharge in any future bankruptcy proceeding. § 349(a); (2) Smock was enjoined from filing any bankruptcy cases for a period of five years; and (3) the lawyer who represented Smock in her Chapter 13 case was reprimanded and ordered to repay his fee, in the amount of $1,300. The lawyer who handled the personal injury suit was not sanctioned, notwithstanding the fact that he violated a number of provisions of the Bankruptcy Code. The Court found that he did not know of the bankruptcy filing and for that reason, it would not be appropriate to impose a sanction.[5]

In cases under Chapters 7 and 11, the Bankruptcy Code regulates the retention and compensation of lawyers who represent Chapter 7 bankruptcy estates and Chapter 11 debtors in possession. See, §§ 327-330; 704, 1107; In re: Tri-State Plant Food, Inc., 273 B.R. 250 (Bankr. M.D. Ala. 2002). In cases under Chapter 13, the question of retention of counsel to litigate prepetition claims, which are property of the estate, is not as clear. The District Court concluded that the Chapter 13 Trustee, as well as the debtor, have standing to bring or maintain suit on a prepetition cause of action. Looney v. Hyundai Motor Manufacturing Alabama, LLC, 330 F.Supp.2d 1289 (M.D. Ala. 2004). The District Court cited with approval decisions handed

[5] The Debtor in Smock was prosecuted and convicted of bankruptcy fraud in criminal proceedings in the District Court. United States v. Smock, Case No. 2:03CR217-001, in the United States District Court for the Middle District of Alabama.

down by the Seventh Circuit as well as the Bankruptcy Court for the Southern District of Alabama. See, Cable v. Ivy Tech State College, 200 F.3d 467 (7th Cir. 1999)(Both the Chapter 13 Trustee and the debtor were found to be real parties in interest with standing to sue); The Travelers Indemnity Company of Illinois, Inc., v. Griner (In re: Griner), 240 B.R. 432 (Bankr. S.D. Ala. 1999)(Chapter 13 Trustee and debtor have concurrent capacity to litigate prepetition causes of action). Therefore, Plaintiff Curtis C. Reding, the standing Chapter 13 Trustee in this District, as well as Susan S. DePaola have standing to bring suit.

The case of Edward Childs, one of the debtor/mass tort plaintiffs identified in the Trustee's complaint, is a case under Chapter 13. Childs filed a petition in bankruptcy pursuant to Chapter 13 of the Bankruptcy Code on October 30, 2000, initiating Case No. 00-6028. The Trustee alleges here that Gallagher represented Childs in a civil action in a State Court. It is further alleged that Gallagher settled the case and caused payment of the suit proceeds to be paid directly to Childs, in contravention of the rights of creditors in Childs' bankruptcy case. In Smock, it was undisputed that the lawyer who represented the debtor in a personal injury suit did not know of the bankruptcy proceedings. In this Adversary Proceeding, the Plaintiffs contend that the Gallagher Defendants knew of the bankruptcy proceedings and paid over suit proceeds to the Debtors, with knowledge of the bankruptcy proceedings, in willful contravention of the Bankruptcy Code. Thus, the Smock case supports Gallagher here if, and only if, the evidence establishes that he did not know of the bankruptcy filings. As of this time, this fact is in dispute. The Court notes that the Plaintiffs made an evidentiary showing in response to Gallagher's motion for summary judgment sufficient to show the existence of disputed material facts. In the Childs case, as in the other Chapter 13 cases, it remains to be determined whether Gallagher did

or did not have knowledge of the bankruptcy filings as of the time the proceeds were paid.

III. GALLAGHER'S JURY DEMAND

Gallagher argues that proceedings in this Court should be stayed as he has a right to a jury trial, which cannot be had in bankruptcy court, absent the consent of all parties, which we do not have here. 28 U.S.C. § 157(e). The Plaintiffs argue that Gallagher does not have a right to trial by jury because this proceeding is equitable, and not a proceeding at law, and therefore there is no right to a jury trial. In the alternative, the Plaintiffs argue that even if Gallagher has a right to a jury trial, he has waived it by actions taken, or not taken, during the litigation of this Adversary Proceeding.

The leading case on this issue was handed down by the Supreme Court in 1989, where it described the analysis as follows:

> The form of our analysis is familiar. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." (citations omitted). The second stage of this analysis is more important than the first. (citations omitted). If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42, 109 S.Ct. 2782, 2790, 106 L.Ed.2d 26 (1989).

In Granfinanciera, a defendant in a fraudulent conveyance action, who had not filed a claim, demanded trial by jury, citing their right under the Seventh Amendment. The Supreme

Court found that because actions at law were brought to recover fraudulent conveyances in the late 18th-century England, that the defendant had a right to a jury trial. Id. at 43-44.

The first step is to compare the action brought by the Trustee here with 18th-century actions. The following passage from Granfinanciera is instructive.

> Whether the trustee's suit should be at law or in equity is to be judged by the same standards that are applied to any other owner of property which is wrongfully withheld. If the subject matter is a chattel, and is still in the grantee's possession, an action in trover or replevin would be the trustee's remedy; and if the fraudulent transfer was of cash, the trustee's action would be for money had and received. Such actions at law are as available to the trustee today as they were in the English courts of long ago. If, on the other hand, the subject matter is land or an intangible, or the trustee needs equitable aid for an accounting or the like, he may invoke the equitable process, and that is also beyond dispute. Granfinanciera, at 492 U.S. 33, 44, 109 S.Ct. 2782, 2791 (citing 1 G. Glenn, Fraudulent conveyances and Preferences § 98, pp. 183-184 (rev. ed. 1940)).

The next step of the Court's analysis is to examine the nature of the Trustees' action. If it is one in the nature of an action for money had and received, then it is an action at law, and must be tried before a jury in District Court, unless Gallagher is found to have waived the right to a jury trial. To be sure, the Trustee seeks a sum of money from Gallagher, giving his claim at least the facile appearance of an action for money had and received.[6] On the other hand, the Trustee's action is one which is more in the nature of an accounting. Again, referring to Black's Law

[6] Gallagher does not attempt to identify a common law cause of action at law in his brief, rather he simply assumes that he has such a right, without any explanation as to why. To complete the analysis, an action for money had and received is "recoverable because (1) the money had been paid by mistake or under compulsion, or (2) the consideration was insufficient." Black's Law Dictionary, Eighth Ed., defn. "action for money had and received."

Dictionary, an action for an accounting is defined as "a rendition of an account, either voluntarily or by court order. The term frequently refers to the report of all items of property, income, and expenses prepared by a personal representative, trustee, or guardian and given to heirs, beneficiaries, or the probate court."

In other words, the Trustee's action against Gallagher can be characterized as an action to call upon him to account for the proceeds of the personal injury claims that he handled for the 33 bankruptcy estates named in the Trustee's Third Amended Complaint. Gallagher contends that he cannot be compelled to represent a Trustee against his wishes and objects to the Trustee's characterization of the suit. Gallagher's argument misses the point. To be sure, he cannot be compelled to represent a client that he does not wish to represent. However, once he did so, he was obliged to observe the law. If the Trustee's allegations are found to be true, it would appear that Gallagher would have broken almost every provision of the Bankruptcy Code and the Bankruptcy Rules which governed his behavior. To put the matter differently, one may not simply opt out of the requirements of the Bankruptcy Code simply by ignoring them. The Trustee alleges that Gallagher settled the personal injury claims of 33 clients who were debtors in this court, either under Chapter 7 or Chapter 13. At trial, Gallagher will be called upon to give an account of his actions with respect to these 33 bankruptcy estates.

The actions which the Trustee alleges Gallagher to have taken here strike at the heart of the functioning of a bankruptcy court. The litigation of prepetition causes of action, which are property of bankruptcy estates, are central to the functioning of the bankruptcy system. Moreover, the compromise and liquidation of such claims, the distribution of proceeds of the various claims and the compensation of officers of the estate (§ 327), are fundamentally and

uniquely bankruptcy functions. Moreover, the Trustees' claims against Gallagher are core proceedings within the meaning of 28 U.S.C. § 157(b)(2)(A), (E).

There are four factors which weigh in favor of a finding that the Trustee's action is in the nature of one for an accounting an action in equity, rather than one for money had and received, an action at law. First, Gallagher is a lawyer, a professional, who had control over the Debtors' property. Gallagher postures as if this were an action between parties dealing at arm's length, however, Gallagher had a fiduciary duty to his client, the duty that any lawyer owes to his client. Second, the property was an intangible, a cause of action, which was to be reduced to money. Third, the litigation, that is the act of reducing a cause of action to money, took place during and was part and parcel of the administration of the Debtors' estates. As has been shown above, one of the most fundamental duties of a Trustee is to take charge of the debtor's property and reduce it to cash and distribute it to creditors. This cause of action is at the heart of that process. Fourth, this action also looks to the Court to sanction Gallagher for the violation of his duties under the Bankruptcy Code. The Bankruptcy Court has both the inherent and statutory authority to regulate the conduct of lawyers who take part in the litigation of causes of action which are property of a bankrupt estate. That is, the Trustee wants not only disgorge attorney's fees which he contends that Gallagher has improperly withheld for himself, and not only to call upon him to account for funds improperly paid to Debtors, which should have been paid to creditors, but also to sanction Gallagher for his willful violation of pertinent provisions of the Bankruptcy Code and the Bankruptcy Rules. Examining the Trustee's claims against Gallagher, it appears that they are not in the nature of actions at law, as recognized by the laws of England in the late 18th-century, but rather a proceeding in equity for an accounting, and if appropriate for a sanction to be

imposed on Gallagher as a fiduciary for the estates if it is determined that he has violated his duties.

It is well established that bankruptcy proceedings are equitable in nature. "We have long held that 'bankruptcy courts are indeed courts of equity, and they have the power to adjust claims to avoid injustice or unfairness.' In re: Empire for Him, Inc., 1 F.3d 1156, 1160 (11th Cir. 1993)(quoting In re: Saybrook Mfg. Co., 963 F.2d 1490, 1495 (11th Cir. 1992)). Section 105(a) grants the bankruptcy court the power to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions' of the Bankruptcy Code and take 'any action or make any determination necessary to enforce or implement court orders or rules, or to prevent an abuse of process." Morgan v. United States (In re: Morgan), 182 F.3d 775, 779 (11th Cir. 1999). This process of implementation of the bankruptcy laws and rules is plainly not an action at law. Moreover, if the Trustee's allegations prove to be founded, Gallagher has perpetrated a massive injustice which must be remedied. Proceedings such as this are in no way shape or form, in the nature of an action at law which might have been brought in the Courts of England in the late 18th-century.

Having considered the nature of the cause of action here, the Court determines that it is in the nature of an equitable proceeding and not an action at law for which one has the right to trial by jury under the Seventh Amendment. Given the Court's determination of this issue, it need not reach the question of whether Gallagher has waived his right to trial by jury.

IV. WITHDRAWAL OF REFERENCE

All bankruptcy jurisdiction is vested in the District Courts. 28 U.S.C. § 1334. Congress has given the District Courts the option of referring bankruptcy cases, and related proceedings, to bankruptcy judges. 28 U.S.C. § 157(a). The District Court entered a General Order of Reference on April 25, 1985. The District Courts are given discretion to withdraw reference upon a showing of cause. 28 U.S.C. § 157(d); see also, Rule 5011, Fed. R. Bankr. P.

In Gallagher's motion for stay, it is alleged that reference must be withdrawn from the Bankruptcy Court to preserve his right to trial by jury. As set forth in Part III above, Gallagher does not have a right to trial by jury because this is an equitable proceeding, not an action at law for which one has a right to trial by jury under the Seventh Amendment.

During the oral argument held on May 1, 2006, both counsel alluded to the Motion to Withdraw the Reference, which has been filed with the District Court. That motion is not before this Court, but it appears that this Court's denial of Gallagher's motion for summary judgment also provides grist for Gallagher's arguments. It would appear that Gallagher is of the view that the District Court should withdraw reference to correct errors made by the Bankruptcy Court in its denial of Gallagher's motion for summary judgment. This argument is without merit. Indeed, any party to any adversary proceeding may, and frequently does, file a motion for summary judgment. The Bankruptcy Court acts on such motions as a matter of course. Any party who does not prevail on his motion could then, using Gallagher's reasoning, withdraw the reference to fix the mistakes made by the Bankruptcy Judge. This clearly is not grounds for withdrawal of the reference but rather an appeal, which is not yet ripe because the denial of a motion for summary judgment is not a final order. If Gallagher's argument were valid, then Bankruptcy

Courts would rarely try anything, as the party which did not prevail on a dispositive pretrial motion could then move for withdrawal of the reference.

As a final matter, the Court would criticize the timing of Gallagher's motion. This Adversary Proceeding was filed on June 25, 2003, almost three years ago. This Adversary Proceeding is scheduled for trial beginning May 22, 2006. This trial setting was established by this Court's order of September 30, 2005. Gallagher did not file his motion to withdraw the reference until April 19, 2006. A motion to withdraw the reference must be filed "timely." 28 U.S.C. § 157(d). Under these facts, Gallagher's motion is not timely.

V. CONCLUSION

Gallagher's motion to stay proceedings is DENIED, for the following reasons. First, the Trustee's action against Gallagher is equitable in nature, therefore, there is no right to trial by jury. Second, withdrawal of the reference is not a proper substitute for an appeal. The denial of Gallagher's motion for summary judgment does not provide cause for withdrawal of the reference. Third, Gallagher's motion to withdraw the reference is not timely. For these reasons, the motion to stay is DENIED.

Done this 4th day of May, 2006.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Steve Olen, Esq.
David B. Anderson, Esq.
Frank L. Parker Jr., Esq.
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